No. 95-427

In The Supreme Court of the United States

October Term, 1995

Supreme Court, U.S.
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COUNTY OF SAGINAW; M.B. GOLDBERGER, D.O., individually and as Saginaw County Chief Medical Examiner,

Petitioners,

v

DIANE M. WHALEY, et al; WILLIAM E. JONES, et al; CHRISTINE M. TUNNEY, et al; RITA SHARRARD; LUCILLE JONES MILLER, et al; GEORGE SAUNDERS, et al; COUNTY OF TUSCOLA, through its governing body, Tuscola County Board of Commissioners; ARMANDO HERRERA, Executive Director of Mid Regional Tissue Center; ARMANDO HERRERA, individually, and d/b/a Central Michigan Eye Bank and Tissue Center, d/b/a Central Michigan Eye Bank; MID REGIONAL TISSUE CENTER, a Michigan non-profit corporation; SAGINAW COMMUNITY HOSPITAL, a county public hospital; LANKENAW HOSPITAL, a Pennsylvania non-profit corporation; CHRISTOPHER C. TAYLOR, individually, and as former Tuscola County Commissioner; HERBERT L. NIGG, M.D., individually; RONALD G. HINES, M.D., Pathologist for Tuscola County; IRVING M. RABER, M.D., a Pennsylvania professional corporation; JAMES W. BAKER, Personal Representative for the Estate of Armando Herrera, Deceased,

Respondents.

On Petition For A Writ of Certiorari
To The United States Court of Appeals
From The Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Plaintiffs brought these §1983 actions, alleging that the Defendants violated their Fourteenth Amendment procedural due process rights by removing the corneas and/or eyes of their recently deceased relatives. The question presented is whether under Michigan law next of kin have a constitutionally protected property interest in deceased relatives' bodies enabling them to assert procedural due process claims under 42 USC §1983.

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I

STATEMENT OF THE CASE

A. Introduction

These six cases arose out of the non-consensual removal of eyes and/or corneas from bodies held for Saginaw and Tuscola County Medical Examiner autopsies. Initially they were not consolidated. The Sixth Circuit's recitation of facts, on which Petitioners rely, is largely correct, but overlooked some of the documented facts and/or misstated others. So that there be no misunderstanding, the Respondent Plaintiffs point out the following inaccuracies in the Sixth Circuit's statement of facts:

1. The Sixth Circuit failed to identify Dr. Hines as a Deputy Medical Examiner in Saginaw County, as well as its contracted pathologist for Medical Examiner autopsies.[1] He pronounced the death in the Saunders case.

2. The business arrangement existed only between Saginaw County and Herrera.[2] There was no such agreement with Tuscola County as recited below.

3. Corneas and/or eyeballs were removed while the bodies were held for Medical Examiner autopsy; enucleation not always following autopsy as recited below.[3]

4. Contrary to the lower opinion, Plaintiffs sued only in federal court after discovery in a state court action, involving another autopsy, produced records of more than forty other non-consensual tissue removals at Medical Examiner autopsies

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[1] *Whaley*, First Amended Complaint, ¶2 and Exhibit 5, Death Certificate.

[2] Appendix 1 and 2.

[3] The autopsy reports on Ricky Jones, Glenn Sharrard and Lee Tunney stated Dr. Hines found the corneas removed on external examination of the bodies. *Jones* Brief, 7/6/93, Ex. 2; *Sharrard* Complaint, Ex. 11; and *Tunney* Complaint, Ex. 10.

performed by Hines, and the disposition of harvested tissue outside Michigan and the United States.[4]

5. Consolidation was ordered at the hearing on Defendants' Motions for Summary Disposition.[5]

These actions were dismissed under FRCP 12(b)(6), but dismissal had also been sought under FRCP 56(b). The sizeable record below amply demonstrates Petitioners' policy of allowing non-consensual tissue harvest at Saginaw County Medical Examiner autopsies and its occurrence in these cases. Such explains Petitioners' desperation in seeking certiorari at this stage of the proceedings.

Petitioners have incorrectly named all other parties to these consolidated cases as "Respondents". Rita Sharrard is Plaintiff in an action arising out of a Tuscola County autopsy. Tuscola County, and its late Medical Examiner, Dr. Nigg, conceded below that Plaintiffs/Respondents have sufficient interests in the bodies of their respective decedents to warrant due process protection. As noted by the Sixth Circuit, Tuscola County contends that it did not have a policy allowing non-consensual cornea removal and deserves dismissal under FRCP 56(b). (Petitioners' Appendix 1, ftnt 1.)

B. Legal Proceedings Below.

1. The District Court Proceedings

The foregoing has addressed the inadequacies in Petitioners' recital as to the proceedings in the district court.

2. The Decision of the Sixth Circuit Court of Appeals

Defendants inaccurately portray the Sixth Circuit's decision as grounded in the conclusion "that what is relevant for the *Brotherton* analysis is that the right to possess the body exist, not that the right was grounded in Michigan statute or in the common

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[4] *Whaley* First Amended Complaint, ¶¶37-41 and Ex. 7-11; *Tunney* Complaint, ¶¶40-43 and Ex. 2, 11-12; *Saunders* Complaint, ¶¶51-54; *Jones* Complaint, ¶¶34 and 43 and Ex. 14-16; and *Miller* Complaint, ¶¶31-33, 35-36, and Ex. 1-2, 5-8, and 10-11.

[5] Tr., 9/29/93, p 5.

law of Michigan." (Petition, p 6, citing *Brotherton v Cleveland*, 923 F 2d 477 (6th Cir., 1991).) *Brotherton* found that "the aggregate of rights granted by the state of Ohio to the next of kin rises to the level of a 'legitimate claim of entitlement' in the deceased person's body, including his corneas, protected by the due process clause of the fourteenth amendment." *Brotherton, supra*, p 482. Included within that "aggregate" were the rights to possess the body and to control the disposition of the body. *Ibid.*

Reviewing Michigan law, after noting that the existence of a constitutionally protected property interest turns upon the substance of the right as opposed to its label under state law, the Sixth Circuit found that the laws of Ohio and Michigan are "in substance the same" and "(i)f anything, Michigan is even more explicit in its acknowledgment of these rights." (Petitioners' Appendix 7.) It cited three Michigan Supreme Court cases holding that the next of kin "are entitled to possession of the body as it is when death comes, and that it is an actionable wrong for another to interfere with that right by withholding the body or mutilating it in any way." *Ibid.*, pp 9-10, citing *Doxtator v Chicago & W. Mich R.R.*, 120 Mich 596, 597 (1899); *Keyes v Konkel*, 119 Mich 550, 551 (1899); and *Deeg v City of Detroit*, 345 Mich 371, 376 (1956); as well as *Tillman v Detroit Receiving Hosp.*, 138 Mich App 683; 360 NW 2d 275, 277.[6] It also found: Michigan's version of the Uniform Anatomical Gift Act was the same as Ohio's in granting next of kin the choice of making a gift of all or part of a decedent's body, at least when the decedent had not evidenced a contrary intent[7]; other Michigan statutes contemplate that next of kin have the right to possess the body for burial; and, that the district court had "mistakenly focused on the label attached to the right rather than its substance." These rights being found under Michigan law, and to "closely correspond with

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[6] Petitioners' reliance on *Tillman, supra*, is further misplaced because, ultimately, it addressed whether a decedent's personal representative had standing to challenge non-consensual corneal removal as an invasion of the decedent's privacy. The right of privacy ending at death, the Michigan Court of Appeals rejected "plaintiff's constitutional challenge predicated on the right of privacy." *Ibid.*, at 687.

[7] Ohio has subsequently amended its law. Infra.

the 'bundle of rights' by which property has been traditionally defined", the Sixth Circuit reversed the dismissal of these consolidated cases. (Petitioners' Appendix, pp 10-13.)

II

REASONS FOR DENYING THE PETITION

A. This is Purely a Matter of Construing State Law.

This Court places great deference upon the interpretation of state law made by the Court of Appeals. *Haring v Prosise*, 462 US 306, 314, n. 8; 103 S Ct 2360, 2373, n. 8; 76 L Ed 2d 595, 604, n. 8. Here, that interpretation was in accord with numerous prior decisions of this Court as to the means by which to determine the existence under state law of sufficient property interests to warrant due process protection.

> "The Fourteenth Amendment places procedural constraints on the actions of government that work a deprivation of interests enjoying the stature of 'property' within the meaning of the Due Process Clause. Although the underlying substantive interest is created by 'an independent source such as state law' federal constitutional law determines whether that interest rises to the level of a 'legitimate claim of entitlement' protected by the Due Process Clause. *Board of Regents v Roth*, 408 US 564, 577; 92 S Ct 2701; 33 L Ed 2d 548 (1972); *Perry v Sinderman*, 408 US 593, 602; 92 S Ct 2694, 33 L Ed 2d 570 (1972). The outcome of that inquiry is clear in this case." *Memphis Light, Gas & Water Div. v Kraft*, 436 US 1, 9; 98 S Ct 1554; 56 L Ed 2d 30 (1978). See also, Petitioners' Appendix, pp 5-6.

Petitioners recognized that Plaintiffs' claims were grounded upon the decision in *Brotherton, supra*, so they rejected it as improperly decided and/or distinguishable. They assert that the Sixth Circuit has improperly stretched the constitutional protection of property rights beyond the meaning of "property" used in the Fourteenth Amendment. Petitioners cite no authority and have failed to

distinguish Plaintiffs' or Mrs. Brotherton's entitlement to the remains of their deceased family members from the statutory entitlements recognized by this court as warranting pre-deprivation due process protection in the following cases cited in *Brotherton*:

> *Goldberg v Kelly*, 397 US 254; 90 S Ct 1011; 25 L Ed 2d 287 (1970) — welfare recipient had claim of entitlement under statute to continued benefits requiring eligibility hearing before benefits were cut off.
>
> *Boddie v Connecticut*, 401 US 371; 91 S Ct 780; 28 L Ed 2d 113 (1971) — state denied due process to indigents by denying statutory entitlement to divorce absent payment of court costs and fees.
>
> *Bell v Burson*, 402 US 535; 91 S Ct 1586; 29 L Ed 2d 90 (1971) — driver's license as a statutory entitlement cannot be taken away without notice and opportunity for hearing.
>
> *Fuentes v Shevin*, 407 US 67; 92 S Ct 1983; 32 L Ed 2d 566 (1972) — replevin statutes authorizing prejudgment repossession of household goods held to violate procedural due process.

These cases show that the Sixth Circuit has not expanded any definition or the concept that statutory entitlements are sufficient to warrant pre-deprivation due process under 42 USC 1983.

While the district court's interpretation differed, the appellate court clearly identified the district court's error by following this Court's admonition to look for substance rather than label in determining the existence of property rights under state law. Petitioners' argument relies purely on label, and is faulty for the same reason.

> "Few things are more cherished, respected, or sacred than the right to bury our dead. There is a cognizable and compensable interest under Michigan law in 'the comfort of knowing that the deceased has been given a comfortable and dignified resting place.' *Allinger v Kell*, 102 Mich App 798, 808-809, 302 NW2d 576, rev'd

> on other grds, 411 Mich 1053, 1053-54, 309 NW2d 547 (1981) (citing Restatement (Second) of Torts §868, p 274 (1979))." *Vogelaar v United States*, 665 F Supp 1295, 1306 (1987).

Petitioners' chastise Plaintiffs for choosing not to pursue state law claims for mutilation of a body. (Petition, p 13.) They further assert immunity under MCLA 333.10203; MSA 14.15(10203) and MCLA 333.10108; MSA 14.15(10108). These issues were not passed upon in the lower courts. (Petitioners' Appendix, p 3, fn 1) But, recognizing the Sixth Circuit's decision as correct on the Due Process issue, then state immunity defenses must fail.[8]

There is no reason for this Court to entertain further review as to whether Michigan law recognizes the rights found by the lower court or whether those rights warrant due process protection.

B. There is No Conflict Between the Circuits.

Despite Petitioners' assertion, no other circuit has reviewed Michigan law as to whether next of kin have a sufficient interest in a decedent's body to warrant due process protection. In addition, each case cited as conflicting with *Brotherton, supra,* and the present action, is distinguishable.

Arnaud v Odom, 870 F 2d 304 (5th Cir., 1989), cert den 493 US 855 (1989), dealt with wrongful experimentation upon decedents' bodies, not non-consensual tissue removal. The dismissal of plaintiff's Section 1983 claims was grounded in there

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[8] "'Municipal defenses — including an assertion of sovereign immunity — to a federal right of action are, of course, controlled by federal law.' *Owen v City of Independence*, 445 US 647, n 30, 63 L Ed 2d 673, 100 S Ct 1398. 'By including municipalities within the class of 'persons' subject to liability for violations of the Federal Constitution and laws, Congress — the supreme sovereign on matters of federal law — abolished whatever vestige of the State's sovereign immunity the municipality possessed.' *Id.*, at 647-648, 63 L Ed 2d 673, 100 S Ct 1398 (footnote omitted)." *Howlett v Rose*, 496 US 356, 376; 110 S Ct 2430; 110 L Ed 2d 332 (1990).

"'Congress surely did not intend to assign to state courts and legislatures a conclusive role in the formative function of defining and characterizing the essential elements of a federal cause of action.' *Wilson v Garcia*, 471 US 261, 269, 85 L Ed 2d 254, 105 S Ct 1938 (1985)." *Ibid.*, p 378.

being adequate state law remedies to redress the plaintiff's injuries. *Ibid.*, p 309. The Eighth Circuit decisions do not support Petitioners either. *Fuller v Marx*, 724 F 2d 717 (8th Cir., 1984), found adequate pre-deprivation process under Arkansas Statutes Annotated, 82-434, to defeat a Section 1983 claim for failure to return a decedent's organs after autopsy. It did not reach the Constitutional issue.[9] Petitioners inaccurately state that *Lawyer v Kernodle*, 721 F 2d 632 (8th Cir., 1983), "affirmed the dismissal of the constitutional claim because the Plaintiff failed to show a deprivation of any property interest." (Petition, p 20.) *Lawyer, supra*, stands for no such proposition. Actually, the Eighth Circuit found that Missouri law confers on a surviving husband "a quasi-property right which entitles him to the possession and control of the body for the single purpose of decent burial." *Ibid.*, p 734. No due process violation was asserted where the husband alleged negligent diagnosis of cause of death, rather than interference with his "right to bury his deceased spouse." *Id.*, p 735.

Similarly, the Florida and Georgia supreme court decisions asserted as conflicting with the lower court are readily distinguishable. *Florida v Powell*, 497 So 2d 1188 (1986), did not employ a *Memphis Light, supra*, inquiry as to whether survivor's statutory entitlement to receive and dispose of a decedent's body was a sufficient property interest to warrant due process protection. Rather, on a balancing of interests inquiry, it found Florida's non-consensual cornea removal provision "reasonably achieves the permissible legislative objective of providing sight to many of Florida's blind citizens" *Ibid.*, p 1191. Unlike the present case where corneas and/or eyes were shipped out of state and overseas, it found that Florida's "medical examiners may not automatically remove tissue from all decedents subject to autopsy; rather, a request must be made by an eye bank based on a present need for the tissue." *Id.* Similarly, *Georgia Lions Eye Bank v LaVant*, 255 Ga 60; 335 SE 2d 127 (1985), found that Georgia's non-consensual corneal removal provision "yearly benefits hundreds of Georgians".

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[9] "Any quasi-property rights Mrs. Fuller had in her husband's internal organs, if protected by the Constitution, were also protected by the Arkansas statute." *Arnaud, supra*, at p 719.

Ibid., p 129. Neither employed the *Memphis Light, supra,* line of inquiry. But, *Georgia Lions Eye Bank, supra,* found a common law "quasi-property right" in the possession and control of a decedent's body. *Ibid.*, p 128. *Florida, supra,* cited numerous decisions recognizing that next of kin are entitled to possession of a decedent's body, but refused to classify it as a "property" right. *Ibid.*, p 1191-92. Both cases appeared to focus on the label attached to the right, rather than upon its substance. But, unlike the present case, both focused on balancing intrastate interests. Neither necessarily support a medical examiner's employment of a tissue harvester and non-consensual corneal removal for interstate and international sale as occurred here.

Florida has subsequently enacted laws and regulations: establishing a state registry for organ donation, requiring hospital administrators to check the registry and/or obtain consent from the next of kin before any organ or tissue removal, prohibiting a medical examiner from allowing an organ or tissue procurement agency to provide employees or salaries for any members of the medical examiner's office, and defining "donation" as "the free and voluntary gift of one or more organs or tissues for the purpose of medical research or transplant." See Appendix 3-4 and 3-5, *infra.*

In addition, Petitioners have failed to cite any decisions from other circuits contrary to their position. Two such cases are *Perry v Saint Francis Hospital*, 886 F Supp 1551 (DC, KA, 1994); 865 F Supp 724; and *Lyon* v *United States*, 843 F Supp 531 (DC, MN, 1994). The former is "a tissue donation case in which the plaintiffs allege that defendants took from the ... body more tissue than what the plaintiffs' (sic) had agreed to donate." *Perry, supra,* p 1553. It found: "Kansas law considers Mary Anne Perry (the widow) to be the exclusive owner of a quasi-property right in the body, namely, the right to possess it for the limited purposes of preserving and burying it." *Ibid.*, p 1563. *Lyon, supra,* found a Veteran's Administration Hospital and physician entitled to "good-faith immunity" under Minnesota's version of the Uniform Anatomical Gift Act. (MSA ¶¶525.921 to 525.9224.) There, a decedent's eyes were removed after consent was denied, but upon discovery of the error, the eyes were returned in time for burial

with the remainder of the body. It found the good-faith immunity provision under the Act "designed for situations ... where because of confusion an organ is removed without genuine consent." *Lyon, supra,* p 736. Here, there was neither confusion, nor any consent whatsoever, where no effort was made to obtain Plaintiffs' consent to tissue removal or their refusals to consent were blatantly disregarded.

Taken altogether, whether a survivor's interest in a decedent's body warrants due process protection is a question of state law, so the existence of varying decisions between the circuits does not mean that this Court should intercede and adopt one circuit's position over that of any other. Despite their protestations, Petitioners have not shown that the Sixth Circuit erred in *Brotherton, supra,* or the present case.

C. Conscription of Organs is Neither Preferred Nor A Matter of National Policy.

1. The Evolving Uniform Anatomical Gift Act.

Petitioners passionately argue that the need for non-consensual eye and cornea removal justifies certiorari and declaration that "conscription of organs" (Petition, p 22) outweighs the rights of decedents' survivors. There are numerous variations between the states with respect to the laws on organ and tissue removal for transplantation.[10] While Petitioners cite the 1987 UAGA, Michigan is not among the twenty-three states which have adopted it. At present, three editions of the Uniform Anatomical Gift Act have been enacted by various states.

The 1968 version of the UAGA contained no provision allowing non-consensual removal of any body part by a medical examiner or coroner. Later, ten states, including Michigan, adopted the section allowing non-consensual corneal removal so long as the Medical Examiner did not know of an objection. Twenty-three states have adopted the 1987 UAGA allowing a medical examiner or coroner to remove any body part for transplantation, provided there has been a reasonable effort to locate the next of kin and inform them of their option to donate tissue.

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[10] For a synopsis of the state laws on organ and tissue procurement, see Appendix 3.

Petitioners mislead by asserting that fifty states have adopted "some form of the UAGA" without identifying the significant disparities between the editions of such Acts. They further mislead by asserting that "'encouraged volunteerism'... has generally been acknowledged as a failure." *Ibid.*, p 22. Indeed, the Prefatory Note to the 1987 UAGA cites the following among the "key problems that hinder organ donation":

> "Failure to systematically approach family members concerning donation.
>
> ...
>
> "Failure to communicate the pronouncement of death to next of kin.
>
> ...
>
> "Failure to obtain adequate informed consent from family members." ULA ANAT GIFT 1987 Ref, citing The Hastings Center Report, *Ethical, Legal and Policy Issues Pertaining to Solid Organ Procurement: A Report of the Project on Organ Transplantation*, 1985.

In addition, the 1987 UAGA includes required request provisions to address these deficiencies. Far from rejecting familial consent as an impediment to organ procurement, the 1987 UAGA more strongly endorses and encourages it as a means of increasing the supply of organs and tissue for transplantation than any prior version. As noted in *Perry v St. Francis Hospital, supra*, at 1559-1560, non-consensual taking of tissue and organs at medical examiner autopsies "is not conduct... that publically encourages the making of anatomical gifts or that protects and balances the conflicting interests 'consistent with prevailing customs and desires in this country.' 8A U.L.A. 15."

Petitioners' argument that the UAGA supports non-recognition of property rights in a decedent's body is contradicted by its evolution. UAGA (1987), together with the federal law requiring request for organ and tissue donation (*infra*), spells the end of "conscription of organs" as advocated by Petitioners.

2. Federal Policy Mandates Request and Consent.

Petitioners' most errant and misleading argument asserts that recognition of survivors' property interests in decedents' bodies will adversely impact on national law. (Petition, pp 22-26.) As a matter of fact and law, the federal government has established a national policy requiring that next of kin be informed of their option to donate organs and tissue from deceased family members and that their consent be obtained.

A National Task Force on Organ Transplantation was created pursuant to 42 USC 274d and assigned to report to various congressional committees on such subjects as "public and private efforts to procure human organs for transplantation", and "identification of factors that diminish the number of organs available". (*Report of the Task Force on Organ Transplantation*, April 1986, xix.) Following an extensive study, the Task Force made recommendations which included the following:

> "1. To facilitate organ donation the Task Force recommends:
>
> . . .
>
> States enact legislation requiring coroners and medical examiners to give permission for organ and tissue procurement **when families consent** unless the surgical procedure would compromise medicolegal evidence. Further, the legislation should (1) require coroners and medical examiners to develop policies that facilitate the evaluation of all nonheart-beating cadavers under their jurisdiction for organ and tissue donation, and (2) provide the next-of-kin with the opportunity to consider postmortem tissue donation. The Task Force further recommends that coroners develop agreements with local tissue banks to help implement these policies.
>
> "2. To facilitate the identification of potential donors and to provide next-of-kin with appropriate opportunities to donate organs and tissues, the Task Force recommends that:

. . .

> Hospitals adopt routine inquiry/required request policies and procedures for identifying potential organ and tissue donors and for providing next-of-kin with appropriate opportunities for donation.
>
> The Joint Commission on the Accreditation of Hospitals develop a standard that requires all acute care hospitals to both have an affiliation with an organ procurement agency and have formal policies and procedures for identifying potential organ and tissue donors and for providing next-of-kin with appropriate opportunities for donation.
>
> . . .
>
> The Health Care Financing Administration incorporate into Medicare conditions of participation for hospitals certified under subpart U of the Code of Federal Regulations, a condition that requires hospitals to have routine inquiry policies.
>
> All state legislatures formulate, introduce, and enact routine inquiry legislation.
>
> The Commission for Uniform State Laws develop model legislation that requires acute care hospitals to develop an affiliation with an organ procurement agency and to adopt routine inquiry policies and procedures." (*Task Force Report, supra,* pp 2-3.)

Contrary to Petitioners' argument that national policy favors non-consensual tissue removal/conscription of organs, the Task Force said:

> "Although there are recurring proposals to extend presumed consent from corneas to other tissues and vascularized organs, both consensus derived from experts in the field and public opinion polls show that there is little support for this mechanism as a way of increasing the availability of donor organs. It is clear that potential organ donors and their families want to

> continue to be the primary decisionmakers. Thus, the Task Force believes that present efforts should focus on enhancing the voluntary system rather than on reducing the role of actual consent." *Ibid.*, pp 30-31.

Congress has responded favorably to the Task Force Report.

> "Following the recommendations of the Task Force, Congress extended the statutory underpinnings of federal policy on organ transplantation in 1986 by establishing the requirement that a hospital have a written protocol for making routine inquiries of potential organ donors as a condition for participation in Medicare. Congress also required that hospitals conducting organ transplants be members of the Organ Procurement and Transplantation Network in order to participate in Medicare or Medicaid. It further required that in order for organ procurement organizations to be reimbursed for procurement costs, they must comply with the provisions of the 1984 legislation and be members of the OPTN." (*Journal of Health Politics, Policy and Law*, Vol. 14, No. 1 (1989), pp 206-207, citing Pub. L. No. 99-509, sec. 9-318; 42 USC 1320b-8.)

> "... all hospitals participating in Medicare are now required to establish a written policy of required request to ensure that all prospective donors (i.e. individuals known by the hospital to be dying) or their next of kin are asked about their willingness to donate organs for transplantation." *Ibid.*, p 210.

Within the past year, Congress has directed the Office of Technology Assessment to conduct a study on the effect of requiring hospitals to affiliate with Organ Procurement Agencies in their service area on the efficacy and fairness of organ procurement and distribution. Pub. L. No. 103-432, Title I, sec. 155(b).

It must be concluded that to the extent the federal government has established policies regarding procurement of tissues from deceased persons for transplantation purposes, those policies attempt to balance each of the following values:

"Saving lives and improving the quality of life.

"Respecting individual autonomy.

"Promoting a sense of community through acts of generosity.

"Showing respect for the decedent.

"Showing respect for the wishes of the family." (*Task Force Report, supra,* p 28.)

As noted by the Task Force, Petitioners' zealous attempt to increase the supply of corneas non-consensually contravened all but the first of these values and Plaintiffs' opposition therefore was readily foreseeable. *Ibid.*

Recognition that a survivor's interest in the body of a deceased loved one warrants due process protection is consistent with the values expressed above and with the developing national policy requiring knowing and voluntary consent in making organ and tissue donation. Without consent, tissue harvesting cannot be said to be donative.

III

CONCLUSION

The foregoing has shown that the decision of the Sixth Circuit was clearly correct in finding that Michigan law grants survivors of deceased persons sufficient interests in their bodies to warrant due process protection. Being a matter of interpreting state law, this court should be loathe to grant certiorari to further review such interpretation. Beyond that, it appears that the developing law and policy concerning organ and tissue donation respects and reveres the rights of such survivors as these Plaintiffs.

Given the developments, especially in the federal law requiring request and consent for organ and tissue harvest on pain of losing Medicare funding, it can be predicted that few, if any, other medical examiners and hospitals will involve themselves in acts of non-consensual tissue harvest as occurred here. Certiorari ought

not to be granted in a case presenting no general questions likely to recur in the future. *Watt v Alaska*, 451 US 259, 273; 101 S Ct 1673; 68 L Ed 2d 80, 93 (1981).

For all of these reasons, the Petition for Certiorari herein, ought to be denied.

Respectfully submitted,

Kenneth K. Wright (P29445)
Counsel of Record
John W. Grigg (P37424)
Seward, Tally & Piggott, P.C.
1009 Washington Avenue
Bay City, MI 48708
(517) 892-6551

Dated: October 11, 1995

January 14, 1988

Dr. M. B. Goldberger
662 Lakewood Circle West
Delray Beach, Florida 33445

Dear Dr. Goldberger:

As per our telephone conversation on January 13, 1988, I am sending you a proposed protocal for your consideration and evaluation. I would, of course, appreciate any input as to how the whole process could be done more efficiently or expeditiously.

As I have stated to you on the phone, the Mid Regional Tissue Center will pay the total cost for the following expenses (expenses are based on per case):

Ambulance (from hospital to funeral home).....	$ 40.00
Use of prep room at the funeral home	125.00
Supplies (surgical/non surgical).....	Unknown
UPS (Toxocology, etc.).....	10.00
Personnel:	
Pathologist performing autopsy (Dr. Hines)	75.00
Diener	17.00
Histotech.....	24.00
Transcriptionist	27.00
Minimum total cost per case	$318.00

Of course, there has to be several conditions to this agreement, as it would not be cost effective for us to do otherwise:

1. Medical Examiner cases which come from another county (i.e. Tuscola County) are responsible to pay Dr. Hines his professional fee for autopsies. (I have already spoken to Dr. Hines about this and he agrees.)

2. Mid Regional Tissue Center will not subsidize costs for any medical examiner cases in which tissue has been previously removed by any of the three following organizations:

A. OPAM (Organ Procurement Agency of Michigan, located in Ann Arbor.)

B. MEB (Michigan Eye Bank, located in Ann Arbor.)

C. Regional Tissue Center (located at Sparrow Hospital in Lansing.)

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3. If we do not get any tissue donation from a medical examiner case, the county pays Dr. Hines (or any other pathologist doing the autopsy) his professional fee and the Mid Regional Tissue Center will pick up the rest of the expenses. (This rarely happens because we usually get at least the corneas.)

Dr. Hines and myself have discussed this program in great detail over the last three-four months. We both agree that there are several aspects to this program which would be more beneficial to the county and to the Mid Regional Tissue Center, if the medical examiner system was moved out of the hospitals:

1. Immeasurable public service being performed, in that such needed human tissue would no longer be wasted. (Due to hospital politics.)

2. Reduction of cost in running the medical examiner system. Possibly the money saved could be used to start other needed medical programs in the county.

I anxiously await the hear from you and hope that we could start this program as soon as possible. Thank you for your time and consideration.

Sincerely,

Armando Herrera
Chief Executive Officer
Mid Regional Tissue Center

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Saginaw County Medical Examiner System
1600 N. MICHIGAN AVENUE-SAGINAW, MICHIGAN 48602
TELEPHONE: (517) 771-0819

May 4, 1988

Armando Herarra
1213 S. Euclid
Bay City, MI 48706

Dear Mr. Herarra:

In accordance with our numerous conversations, it has now been determined for medical examiner cases of Saginaw County, that you will be responsible for the cost of:

Transportation to the morgue
Dictating of autopsy reports
Cost of the deiner
Pathologist's fee, (all if transplant tissues are recovered or one-half if not recovered).

If there are any questions, please contact me.

Sincerely,

M. B. Goldberger, D.O.
Medical Director

MBG/dmt

ORGAN PROCUREMENT LAWS OF THE STATES

The following fourteen (14) states have enacted the UAGA 1968, which does not have a non-consensual medical examiner organ or tissue removal provision:

Alabama	Code 1975, §§ 22-19-40 et seq.
Alaska	AS 13.50.010 et seq.
Iowa	I.C.A. § 142A.1 et seq.
Kansas	K.A.S. 65-3209 et seq.
Louisiana	LSA-R.S. 17:2351 et seq.
Maine	22 M.R.S.A. §§ 2901 et seq.
Missouri	V.A.M.S. §§ 194.210 et seq.
Nebraska	R.R.S.1943, §§ 71-4801 et seq.
New Jersey	N.J.S.A. 26:6-57 et seq.
New Mexico	NMSA 1978, §§ 24-6-1 et seq.
Oregon	ORS 97.250 et seq.
South Carolina	Code 1976, §§ 44-43-310 et seq.
South Dakota	SDCL 34-26-20 et seq.
Wyoming	W.S.1977, §§ 35-5-101 et seq.

The following nine (9) states have adopted the amended UAGA allowing non-consensual corneal removal at Medical Examiner or coroner autopsies provided there is no known objection by the next of kin, i.e. the "induced ignorance" to which *Brotherton* referred:

Connecticut	C.G.S.A. § 19a-281
Delaware	DE ST TI 29, §4712
Georgia	GA ST 31-23-6
Kentucky	KRS 311.165 et seq., the exception being at § 311.187
Michigan	MCLA 333.10101 et seq., the exception being at 333.10202
North Carolina	G.S. §§ 130A-402 et seq.

Ohio	R.C. §§ 2108.01 et seq., which retains the provision found unconstitutional in Brotherton. Ohio has since added §2108.021 requiring hospitals to adopt required request protocols.
Texas	Tex Health & S § 693.012
West Virginia	Code 16-19-1 et seq., the exception being at 16-19-3a.

The following twenty-three (23) states have adopted the UAGA 1987, which requires that medical examiners or coroners ascertain whether the decedent expressed intent to make an organ or tissue donation, obtain consent from next of kin, or make a reasonable effort to contact the next of kin, inform them of their option to make a donation, and obtain their consent before removing any organ or tissues.

Arizona	A.R.S. § 36-851 — but only when the motor vehicle division is closed and after due diligence next of kin cannot be contacted.
Arkansas	A.K.A. §§ 20-17-601 et seq.
California	West's Ann. Cal. Health & Safety Code, §§ 7150 et seq., with specific requirements as to what reasonable effort shall entail, including duration, generally 12 hours, but less for corneas and pituitaries.
Colorado	C.R.S.A. § 30-10-620 — requiring reasonable attempts to contact for a reasonable time.
Hawaii	HRS §§ 327-1 et seq.
Idaho	I.C. §§ 39-3401 et seq.

Indiana	IN ST 36-2-14-19 — requiring reasonable attempt to contact next of kin for 6 hours.
Maryland	MA-ST 113 §14 — requiring one (1) hour good faith effort to notify next of kin.
Massachusetts	M.G.L.A. 113 § 14 — requiring one (1) hour good faith effort to notify next of kin.
Minnesota	M.S.A. §§ 525.921 et seq.
Montana	MCA 72-17-101 et seq.
Nevada	NRS 451.500 et seq.
New Hampshire	NH ST § 291-A:7-b with limited immunity.
Oklahoma	63 O.S.A. § 2210.1
North Dakota	NDCC 23-06.2-01 et seq.
Pennsylvania	20 Pa. C.S.A. § 8641
Rhode Island	G.L. 1956 §§ 23-18.6-1 et seq.
Tennessee	T.C.A. § 68-30-204 — effort to contact next of kin shall continue until further delay would violate existing medical standards.
Utah	U.C.A. 1953, 26-28-1 et seq.
Vermont	18 V.S.A. §§ 5238 et seq.
Virginia	Code 1950, §§ 32.1-289 et seq.
Washington	West's R.C.W.A. 68.50.500 et seq.
Wisconsin	W.S.A. 157.06

The remaining four (4) states offer even greater protection to the rights of next of kin than the UAGA 1987. Notable is the extensive revamping of Florida statutes and regulations since the decision in *Florida v Powell, supra,* which would specifically preclude the acts underlying that case or the present action.

Florida	Fl. Legis. 95-423 (eff. 6/18/95) — amended or added numerous provisions, creating a state organ and tissue donor registry, requiring every hospital to check with the registry and/or obtain consent from next of kin before any organ or tissue removal, and for certification of all organ and tissue procurement agencies. 11 FL ADC r. 11G-1 prohibits a medical examiner from allowing an organ or tissue procurement agency to provide employees or pay the salaries of any members of a medical examiner's office. 59 FL ADC r. 59A-1 defines "donation" as "the free and voluntary gift of one or more organs or tissues for the purpose of medical research or transplant."
Illinois	IL St Ch 755 §55/1 — Upon request from specified entities, coroner or medical examiner may remove cornea for transplant after "reasonable good faith effort" to contact next of kin.

Mississippi.....	Code 1972 § 41-61-71 — requires consent or failure to determine next of kin after reasonable effort. Perhaps following the suggestion in the Duke University *Journal of Health Politics, Policy and Law*, Vol. 14, No. 1, Spring 1989, pp 191-227, §41-39-9 allows a person to contract to make an organ or tissue donation after death. Revocable, provided seller repays monetary consideration plus interest at six percent (6%).
New York	NY Pub. Health §4222 — grants immunity to coroner or medical examiner as to cornea or pituitary removal only when consent has been obtained.